In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1665

MARGARET JENKINS, PETITIONER

v.

UNITED STATES POST OFFICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1) is reported at 475 F. 2d 1256. The judgment of the district court (Pet. App. A-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1973. The petition for a writ of certiorari was filed on June 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's dismissal from her job as a probationary Postal Service employee for "conduct unbecoming a postal employee" was a deprivation of liberty that entitled her to a prior hearing under the Due Process Clause of the Fifth Amendment.

REGULATIONS INVOLVED

5 C.F.R., Chapter I, Part 315, provides in pertinent part:

315.801 — Probationary period; when required.

(a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period * * *.

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315.802 — Length of probationary period.

(a) The probationary period required by § 315.801 is 1 year.

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315.803 — Agency action during probationary period (general).

The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

315.804 — Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum,

consist of the agency's conclusions as to the inadequacies of his performance or conduct.

* * * * *

315.806 — Appeal rights to the [Civil Service] Commission.

(a) *Right of appeal.* An employee may appeal to the Commission in writing an agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Commission's review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) *On discrimination.* (1) An employee may appeal under this subparagraph a termination which he alleges was based on discrimination because of race, color, religion, sex, or national origin. The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.

(2) An employee may appeal under this subparagraph a termination not required by statute which he alleges was based on political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap.

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 [termination for conditions arising before appointment] may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

* * * * *

STATEMENT

Petitioner was hired on August 9, 1969, as a postal trainee, with a one-year probationary period. Approximately five months later, on January 13, 1970, the Seattle Postmaster wrote petitioner that (Pet. App. A-4):

> * * * you will be terminated from the Postal Service because of disqualification during probation effective at the close of business on Tuesday, January 13, 1970.
>
> The reason for this action is your failure to meet the minimum standard requirements of a Substitute Distribution Clerk in that you have displayed conduct unbecoming a postal employee. On January 8, 1970, at Sears Roebuck & Co., you engaged in an argument with employees regarding their refusal to cash a personal check. In the presence of several of their employees and many of their customers, you used loud and profane language. This is in direct violation of Postal Manual, Conduct of Employees.[1]

The letter also noted that "[t]here is no allowable appeal from this decision through the Post Office Department procedures" (Pet. App. A-4).

After exhausting all administrative remedies (R. 41-50),[2] petitioner brought this action for reinstatement to her former position, back pay, and other relief. The gravamen of her complaint was that she was entitled to a pre-dismissal hearing. Conceding that probationary employees are not entitled to such hearing under the applicable regulations (see 5 C.F.R. 315.804), she contended that dismissal "without opportunity for

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[1] Petitioner denied the charges contained in the letter (Pet. 3).

[2] "R." references are to the record on appeal filed in the court of appeals.

a hearing deprived her of the right to due process of law * * * " (R. 9).

The district court granted the government's motion for summary judgment. The court of appeals affirmed, noting that "[p]laintiff's status [as a probationary employee] did not give rise to a property interest entitling her to a pre-dismissal hearing" (Pet. App. A-2). The court also rejected her suggestion "that the Constitution requires a hearing to protect an individual's liberty any time a government employee is discharged under circumstances which reflect unfavorably upon his character" (Pet. App. A-2).

ARGUMENT

1. It is well-settled that federal probationary employees are subject to summary dismissal during the period of their probation, and that due process is satisfied so long as the federal agency adheres to its own regulations when effecting such a discharge.[3] See, *e.g.*, *Jaeger* v. *Freeman*, 410 F. 2d 528 (C.A. 5); *Medoff* v. *Freeman*, 362 F. 2d 472 (C.A. 1); *Donovan* v. *United States*, 433 F. 2d 522 (C.A. D.C.), certiorari denied, 401 U.S. 944. As a probationary employee of the United States Postal Service, petitioner was entitled only to notice of her separation, the reason for it, and effective

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[3] This case is unlike *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted, April 2, 1973, which involves the constitutionality of discharge procedures for *permanent* federal employees. It is also unlike *Sampson* v. *Murray*, No. 72-403, petition for certiorari granted, March 19, 1973, which, while involving a probationary employee, raises an entirely different question—whether the district court may properly order an agency to retain an employee pending her exhaustion of her remedies with the Civil Service Commission.

date of severance. 5 C.F.R. 315.804. Under these regulations, petitioner had no right to an appeal, since she did not claim that her termination was motivated by such improper considerations as race or religion. 5 C.F.R. 315.806(b).

2. Petitioner now argues that she has suffered loss of reputation and employment opportunities as a consequence of her dismissal, and that these putative injuries amount to deprivations of liberty. Indeed, petitioner bases her request for further review solely on the ground that "her petition raises fundamental questions concerning the scope of the Fifth Amendment's protection of liberty" (Pet. 4).

In properly rejecting this contention, the court of appeals noted (Pet. App. A-2):

> Plaintiff suggests that the Constitution requires a hearing to protect an individual's liberty any time a government employee is discharged under circumstances which reflect unfavorably upon his character. This proposition is overly broad. "[A]ny reason [assigned for the dismissal] other than reduction in force is likely to be to some extent a reflection on a probationer's ability, temperament, or character." *Medoff* v. *Freeman*, 362 F. 2d 472, 476 (1st Cir. 1966). Nonetheless, not every dismissal attains constitutional proportions. "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). However, a posting procedure similar to that which concerned the Court in *Constantineau* is not at issue here. Plaintiff's reliance on *Constantineau* is inappropriate.

The grounds on which petitioner was dimissed—that she used loud and profane language when a store refused to cash her personal check—does not involve a charge of wrongdoing that would permanently stigmatize her.[4] Accordingly, the court of appeals correctly held that petitioner was not entitled to a pre-dismissal hearing because her reputation had been impugned.[5]

With respect to the second facet of the due process claim asserted here, petitioner correctly states that this Court indicated in *Board of Regents* v. *Roth*, 408 U.S. 564, that the government may not foreclose an individual's "freedom to take advantage of * * * employment

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[4] Compare *McNeill* v. *Butz*, No. 72-2319, and *Canady* v. *Butz*, No. 72-2320 (consolidated appeal) (decided June 11, 1973), in which the Fourth Circuit held that dismissal of two Agriculture Department employees for "deliberate fraud" against the United States deprived the employees of their "liberty" in the constitutional sense. Slip op. p. 12.

[5] Obviously, a probationary employee has an interest in knowing the reasons for his dismissal. In recognition of this interest, regulations have been promulgated which accord a probationary employee the right to be notified "in writing as to why he is being separated * * *" (5 C.F.R. 315.804). Yet, as the First Circuit explained in *Medoff* v. *Freeman*, 362 F. 2d 472, 476, the arguments that petitioner here makes undercut this interest and are ultimately self-defeating.

> [I]n accepting plaintiff's reasoning, as applied to the facts of this case, we would be supporting the following propositions: (1) that while a summary dismissal of a probationer without giving grounds would be invulnerable, giving a reason which reflects somewhat on his "reputation and standing" opens the door to constitutional challenge; (2) that, if reasons are indeed to be given at all, departmental officials would be well advised to eschew candor and cultivate blandness. * * * We think that the resulting situation would represent no real gains for the individal, but would be a major step backward in effective employer-employee relationships, and a serious judicial erosion, if not abolition, of the concept of a trial or probationary status.

opportunities" (408 U.S. at 573), without according that person the basic due process protections. In applying this principle to this case, however, petitioner misconceives the breadth of the Court's statement. For the Court made it clear that the principle applies only where the putatively aggrieved individual is, as a result of the government's action, actually *foreclosed* from employment opportunities. Thus, in *Roth* itself, which involved the state's refusal to re-employ a non-tenured college teacher, the Court observed (408 U.S. at 574, n. 13):

> Mere proof * * * that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Examiners,* 353 U.S. 232.[6]

Even if petitioner has been "unable * * * to obtain [other] regular employment" (Pet. 7) since her dismissal from the Postal Service, that inability did not necessarily result from that dismissal. The termination of petitioner's federal employment for "conduct unbecoming a postal employee" did not automatically foreclose her from other employment.[7]

The judgment of what grounds for dismissal would "foreclose employment opportunities" so as to be a

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[6] In *Schware* the petitioner's employment opportunities were foreclosed because the state denied him the opportunity to qualify for the practice of law.

[7] Indeed, federal employment is open to petitioner, in the absence of Civil Service Commission debarment action under 5 C.F.R. 731.303. The record does not indicate that any such action has been taken against petitioner.

deprivation of liberty must be made on the basis of the facts known at the time. Petitioner's mere allegation that this dismissal is the cause of her subsequent unemployment cannot control. Otherwise, a marginally employable probationer would be better off than a well-qualified one in asserting a due process claim after identical dismissals.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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